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C O N F I D E N T I A L SECTION 1 OF 3 USBERLIN 0043

E.O. 11652: GDS

TAGS: PGOV, PFOR, WB, GW, UR

SUBJECT: POSSIBLE FEDERAL PROSECUTION OF LORENZ
KIDNAPPERS

1. SUMMARY: ALLIED MISSIONS LEARNED JANUARY 8 THAT
BERLIN PROSECUTOR FORWARDED REPORT ON LORENZ KIDNAPPING
AND OTHER JUNE 2 MOVEMENT ACTIVITIES TO FEDERAL PROS-
ECUTOR (GENERALBUNDESANWALT) DECEMBER 22 WITH REQUEST
THAT FEDERAL OFFICIAL DETERMINE WHETHER HE WISHED TO
TAKE OVER PROSECUTION. SENAT HAD APPARENTLY BEEN UNDER
IMPRESSION THAT WE DESIRED ONLY TO BE INFORMED OF ACTION
NOT CONSULTED. WE HAVE TAKEN STEPS TO ADVISE SENAT
THAT ALLIES WILL WISH OPPORTUNITY TO REVIEW ALL ASPECTS
OF MATTER BEFORE FINAL DECISIONS ARE TAKEN, IN VIEW
OF FACT THAT FEDERAL PROSECUTOR HAS APPARENTLY HAD
MATTER ON HIS DESK FOR MORE THAN TWO WEEKS AND MAY
ACCORDINGLY BE NEAR DECISION, IT MAY BE DESIRABLE FOR
ALLIED EMBASSIES TO AGAIN STRESS IN BONN GROUP DESIRE
THAT WE NOT BE PRESENTED WITH FAIT ACCOMPLI. OUR
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PRELIMINARY INCLINATION IS, HOWEVER, THAT ALLIES SHOULD

PROBABLY NOT RAISE OBJECTIONS TO FEDERAL PROSECUTION BEFORE BERLIN COURT BUT RATHER CONCENTRATE IN DISCUSSIONS WITH GERMANS ON MODALITIES OF ANNOUNCEMENT AND IMPLEMENTATION THAT WOULD AVOID RAISING SOVIET HACKLES TO GREATEST EXTENT POSSIBLE. OUR RESEARCH INTO MAJOR PRECEDENT CASE, TRIAL OF TERRORIST LAWYER HORST MAHLER, INDICATES THAT SOVIETS DID NOT PROTEST FEDERAL PROSECUTION IN 1972 BUT THAT THEY DID OBJECT TO ACTIVITIES OF FEDERAL PROSECUTOR IN BERLIN AT ONE POINT DURING QUADRIPARTITE AGREEMENT NEGOTIATIONS. THEY DID NOT PRESS MATTER, HOWEVER, AND QA DOES NOT CONTAIN LANGUAGE FORBIDDING SUCH ACTIVITIES. END SUMMARY.

2. SENAT LIAISON OFFICERS REQUESTED REPORT FROM CHIEF OF SENAT CHANCELLORY HERZ DECEMBER 30 BASING THEIR INQUIRY BOTH ON SPANGENBERG COMMENTS AND TAGESSPIEGEL ARTICLE REPORTED REF A. HERZ ADVISED THEM JANUARY 6 THAT ALLIES WOULD BE INFORMED IF IT APPEARED THAT CASE WOULD BE HANDLED BY FEDERAL PROSECUTOR'S OFFICE. HERZ INDICATED THAT SUCH NOTICE, PURSUANT TO BK/L(69)13, WOULD BE AT AN EARLY ENOUGH DATE SO THAT ALLIES COULD RAISE ANY QUESTIONS THEY DESIRED. HE ADDED THAT HE DOUBTED DR. BUBACK WOULD WISH TO APPEAR BEFORE BERLIN COURT IN PERSON (AS OPPOSED TO PERSONNEL FROM HIS OFFICE) AND THAT SENAT WOULD BE OPPOSED TO SUCH A HIGHLY VISIBLE PARTICIPATION. HERZ GAVE NO INDICATION THAT ANY DECISIONS WERE IMMINENT, HOWEVER, AND REPEATED THIS TO MINISTERS JANUARY 8.

3. SOMEWHAT SURPRISINGLY ALLIED MISSIONS RECEIVED MEMORANDUM JANUARY 8 FROM CHIEF OF SENAT CHANCELLORY'S LEGAL SECTION, DR. HEIDELMEYER, ADVISING THEM UNDER BK/L(69)13 THAT BERLIN PROSECUTOR HAD ALREADY SUBMITTED HIS REPORT TO DR. BUBACK ON BERLIN INVESTIGATION INTO VARIOUS ACTIVITIES OF JUNE 2 MOVEMENT "WITH A VIEW TO OBTAINING HIS LEGAL EVALUATION AND FOR CONSIDERATION OF THE FEDERAL PROSECUTOR TAKING OVER THE PROCEEDING." HEIDELMEYER'S MEMORANDUM PROMISED ONLY THAT "SHOULD THE FEDERAL PROSECUTOR DECIDE IN FAVOR OF TAKING OVER THIS PROCEEDING THE ALLIED KOMMANDATURA WILL LIKEWISE RECEIVE

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TIMELY NOTICE OF THIS SITUATION."

4. ELEVEN PAGE REPORT OF BERLIN PROSECUTOR ATTACHED TO MEMORANDUM STATES THAT STRONG GROUNDS EXIST FOR PROSECUTION OF NINE INDIVIDUALS NOW IN PRISON IN BERLIN AS WELL AS THREE PERSONS STILL AT LIBERTY FOR LORENZ KIDNAPPING, FOR PROSECUTION OF AT LEAST FOUR INDIVIDUALS FOR KILLING OF BERLIN JUDGE VON DRENKMAN, AND FOR PROSECUTION OF

AS YET UNIDENTIFIED MEMBERS OF JUNE 2 MOVEMENT FOR FOUR BANK ROBBERIES AND ONE BREAK-IN AT WEAPONS STORE IN BERLIN. REPORT NOTES THAT FURTHER STRONGHOLD EXISTS FOR PROSECUTION OF LORENZ KIDNAPPING SUSPECTS ON GROUNDS OF COERCION OF CONSTITUTIONAL ORGANS, AND MEMBERS OF CONSTITUTIONAL BODIES, AND FORMATION AND PARTICIPATION IN CRIMINAL ORGANIZATION (ARTICLES 105, 106, AND 129 OF CRIMINAL CODE RESPECTIVELY). REPORT CONCLUDES THAT ON ACCOUNT OF LATTER COMPLEX OF CHARGES "AND BECAUSE OF THE PARTICULAR SIGNIFICANCE IMPUTED TO THE ACTIVITIES OF THE JUNE 2 MOVEMENT, YOU ARE REQUESTED TO EXAMINE THE QUESTION OF TAKING OVER THE PROCEEDING IN ACCORDANCE WITH ARTICLES 120, PARAGRAPH 1(5), 74A, PARAGRAPH 1(4)(2), AND 142A, PARAGRAPH 1 OF LAW ON COURT ORGANIZATION."

5. PRESUMABLY HERZ, AS WELL AS SPANGENBERG, WERE NOT COMPLETELY ABREAST OF ACTUAL STATE OF LEGAL PROCEEDINGS, AND DR. HEIDELMEYER AND, THROUGH HIM, BERLIN JUSTICE OFFICIALS, WERE NOT FULLY AWARE OF ALLIED SENSITIVITY IN CASE. WE INTEND NOW TO PROPOSE TO ALLIES THAT LEGAL ADVISORS DISCUSS STATUS OF CASE WITH SENATOR FOR JUSTICE OXFORD IN ORDER TO PREPARE RECOMMENDATIONS TO EMBASSIES AND TO STRESS AGAIN OUR HOPE THAT ALLIES WILL HAVE OPPORTUNITY TO REVIEW ALL RELEVANT FACTORS BEFORE FEDERAL PROSECUTOR MAKES ANY DECISION THAT COMMITS US PUBLICLY. BERLIN PROSECUTOR'S REPORT WAS DATED DECEMBER 22, HOWEVER, AND MAKES REFERENCE TO INTERIM REPORT SUBMITTED OCTOBER 10, FEDERAL PROSECUTOR THUS MAY BE WELL INTO REVIEW OF RELEVANT DOCUMENTS AND CLOSER TO MAKING DECISION THAN PREVIOUSLY THOUGHT. SINCE THIS MIGHT HAPPEN BEFORE ROUTINE FRG COORDINATION THROUGH FOREIGN OFFICE WITH FRG JUSTICE MINISTRY AND PROSECUTOR'S

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OFFICE IN KARLSRUHE IS CONCLUDED, EMBASSIES MAY WISH TO REPORT NEW DEVELOPMENT TO FRG IN BONN GROUP AND STRESS NEED FOR PROMPT ACTION.

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6. IN DOING SOME BACKGROUND RESEARCH, WE HAVE FOUND NO INDICATION IN OUR FILES THAT SOVIETS EVER PROTESTED FEDERAL PROSECUTION OF HORST MAHLER, LAWYER ACCOMPLICE OF BAADER-MEINHOF GANG WHO WAS BROUGHT TO TRIAL IN 1972 BEFORE BERLIN KAMMERGERICHT AND CONVICTED OF VARIOUS CHARGES, INCLUDING MEMBERSHIP IN CRIMINAL ORGANIZATION AND ROBBERY, IN EARLY 1973. ALLIES WERE CONCERNED THAT ARTICLE IN SPIEGEL IN FEBRUARY 1972, CONCURRENT WITH PUBLIC ANNOUNCEMENT THAT FEDERAL PROSECUTOR WAS FILING CHARGES AND QUESTIONING COMPATIBILITY OF SUCH A STEP WITH QUADRIPARTITE AGREEMENT, MIGHT SPUR SOVIET PROTEST. IN ORDER TO HEAD OFF SUCH AN EVENTUALITY AT THAT TIME, ALLIED PRESS SPOKESMAN RESPONDED WITH FLAT AFFIRMATIVE TO MORGENPOST QUESTION WHETHER ALLIES CONSIDERED FEDERAL PROSECUTION OF MAHLER BEFORE BERLIN COURT WAS CONSISTENT WITH CITY'S SPECIAL STATUS. (USBERLIN A-052 OF 23 FEBRUARY 1972). WE WOULD APPRECIATE ANY ADDITIONAL INFORMATION ADDRESSEES MAY HAVE CONCERNING SUBSEQUENT SOVIET EXPRESSIONS OF INTEREST IN THE MAHLER TRIAL,
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BUT OUR IMPRESSION IS THAT SOVIETS DID NOT RAISE MATTER WITH ALLIES, EITHER BECAUSE THEY DID NOT WISH TO INITIATE CONTROVERSIAL DISCUSSION WHILE FINAL QUADRIPARTITE PROTOCOL HAD NOT YET BEEN SIGNED OR BECAUSE IT WAS NOT UNTIL VERY END OF 1972, AT WHICH POINT TRIAL HAD BEEN IN COURSE FOR SEVERAL MONTHS, THAT THEY EMBARKED ON

THEIR STUDIED CAMPAIGN OF PROTESTING ANYTHING CONCEIVABLY WITHIN GREY AREA AS QA VIOLATION.

7. ORIGINAL CONCERN OF SENAT AND FRG OFFICIALS OVER MAHLER PROSECUTION IN BERLIN WAS NOT RELATED TO STATUS QUESTIONS. LAW ON COURT ORGANIZATION PURSUANT TO WHICH FEDERAL PROSECUTOR MAY HANDLE CASE SUCH AS THAT OF MAHLER OR OF LORENZ KIDNAPPERS BEFORE A LAND COURT REQUIRES DETERMINATION OF COMPETENCE BETWEEN FEDERAL AND LOCAL OFFICIALS TO BE MADE ON BASIS OF IMPORTANCE OF CASE. THEN SENATOR FOR JUSTICE KORBER FELT STRONGLY THAT MAHLER CASE SHOULD BE HANDLED BY FEDERAL PROSECUTOR, BUT HE INITIALLY SOUGHT TO CONVINCE THAT OFFICIAL IN SUMMER 1971 THAT TRIAL SHOULD BE IN FRG RATHER THAN BERLIN BECAUSE OF THREAT TO PUBLIC ORDER SUCH A TRIAL MIGHT ENTAIL HERE. FRG PROSECUTOR AND SENAT ULTIMATELY AGREED, HOWEVER, THAT BERLIN WAS LOGICAL VENUE IN VIEW OF FACT THAT MOST CRIMES ALLEGED HAD TAKEN PLACE IN CITY, AND SENAT CONCLUDED THAT THREAT FROM RADICAL ELEMENTS, PARTICULARLY AROUND UNIVERSITIES, HAD DECLINED BY FALL OF 1971. SENAT QUERIED ALLIED MISSIONS SEVERAL TIMES IN NOVEMBER 1971 ABOUT MATTER BUT PRIMARILY IN TERMS OF ALLIED JUDGEMENT OF PUBLIC ORDER ASPECTS.

8. SECOND THOUGHTS OF CAUTIOUS FEDERAL PROSECUTOR, PARTICULARLY CONCERN THAT IF DECISION WERE MADE AFTER TRIAL BEGAN THAT BERLIN WAS IMPROPER VENUE GERMAN LAW WOULD REQUIRE DISMISSAL OF CHARGES, LED ALLIES TO SEEK FURTHER CONSULTATIONS WITH SENAT AND TO RAISE MATTER IN BONN GROUP IN JANUARY 1972. SENAT CONFIRMED THAT IT CONSIDERED THERE WERE NOT STATUS DIFFICULTIES WITH FEDERAL PROSECUTION IN BERLIN. FRG ADVISED BONN GROUP JANUARY 28 THAT IT HAD NO OBJECTION TO BERLIN VENUE AND CONSIDERED THAT FEDERAL PROSECUTOR WAS LEGALLY CONFIDENTIAL

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ENTITLED TO HANDLE CASE BECAUSE HE WOULD BE DOING SO PURSUANT TO LAWS TAKEN OVER IN BERLIN AND SUBJECT TO ULTIMATE ALLIED CONTROL THROUGH BK/O(51)63. FRG ARGUED THAT THIS INDICATED THAT FRG PROSECUTOR WOULD NOT BE EXERCISING DIRECT STATE AUTHORITY OVER WESTERN SECTORS CONTRARY TO QA. IT NOTED FURTHER THAT FEDERAL PROSECUTOR WAS NOT AMONG THOSE OFFICIALS AND STATE BODIES SPECIFICALLY RESTRICTED IN BERLIN PURSUANT EITHER TO ANNEX II OF QA OR LETTER OF INTERPRETATION ON ANNEX II PROVIDED BY ALLIED AMBASSADORS TO FRG CHANCELLOR, EVEN THOUGH SOVIETS HAD MADE SUCH A REQUEST ONCE DURING QA NEGOTIATIONS. IN VIEW OF FRG RESPONSE BONN GROUP DECIDED TO RAISE NO FURTHER QUESTIONS. (BONN 1530

OF 1972).

9. NEGOTIATING RECORD OF QUADRIPARTITE AGREEMENT IS LESS THAN CRYSTAL CLEAR BUT APPEARS GENERALLY TO SUPPORT 1972 BONN GROUP CONCLUSION. QA COMMENTARY PREPARED BY ALLIED EMBASSY POLITICAL COUNSELLORS IN 1972 NOTES THAT THERE ARE CERTAIN AMBIGUITIES IN ANNEX II WITH RESPECT TO OPERATION OF FEDERAL ADMINISTRATIVE COURT IN BERLIN BUT THAT "DURING THE NEGOTIATIONS THE RUSSIANS DID NOT MAKE A BIG THING OF THE PRESENCE IN BERLIN OF THE FEDERAL ADMINISTRATIVE COURT OR THE FEDERAL HIGH COURT (BUNDESGERICHTSHOF), THOUGH THEY TOOK AN OPPORTUNITY TO COMPLAIN ABOUT THE COMPETENCE OF THE FEDERAL PROSECUTOR OVER THE WESTERN SECTORS."

10. FEDERAL PROSECUTOR'S ROLE WAS APPARENTLY RAISED TWICE WITHOUT CONCLUSIVE RESULT AT MEETINGS OF ADVISORS, MAY 27-28, 1971. AT FIRST OF THESE MEETINGS DURING WHICH COMPLEX OF ANNEX II WAS DISCUSSED (USBERLIN 958 OF 1971), SOVIET ADVISOR KVITSINSKIY SUGGESTED THAT FOUR POWERS SHOULD FIND SOME FORMULA NOT ONLY FOR FORBIDDING ACTS OF STATE AUTHORITY BY FRG OFFICIALS OVER WESTERN SECTORS BUT ALSO FOR "GENERAL ISSUE OF HOW THEY CONDUCTED THEMSELVES WHILE IN WEST BERLIN AND THE FACT THAT THEY ISSUED OFFICIAL INSTRUCTIONS WHICH WERE CARRIED OUT IN THE WESTERN SECTORS." HE PROPOSED SENTENCE TO EFFECT THAT "DURING VISITS TO THE WESTERN SECTORS, OFFICIAL REPRESENTATIVES OF THE FRG WILL

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COMFORT THEMSELVES IN ACCORDANCE WITH THE PRINCIPLES SET FORTH IN PARA (1) ABOVE." KVITSINSKIY NOTED THAT SOVIETS WOULD WISH TO INCLUDE FEDERAL COURTS IN LIST OF CIRCUMSCRIBED AGENCIES AND IN THIS CONNECTION COMPLAINED THAT MAY 26, 1971 TAGESSPIEGEL CARRIED STORY TO EFFECT THAT FEDERAL ATTORNEY HAD "STATED HIS COMPETENCE FOR BERLIN." KVITSINSKIY SAID THAT "HE FOUND THIS DIFFICULT TO RECONCILE WITH THE CONCEPT THAT THE WESTERN SECTORS WERE NOT GOVERNED BY THE FRG. THE JUDICIAL SYSTEM IN THE WESTERN SECTORS SHOULD NOT ACT IN THE NAME OF THE FEDERAL REPUBLIC." KVITSINSKIY ARGUED THAT ALLIES SHOULD IMPOSE SOME SORT OF REVIEW SYSTEM ON FEDERAL COURT DECISIONS AND TAKE STEPS TO ENSURE THAT "NO ACTS SHOULD TAKE PLACE WHICH RESULTED IN DIRECT APPLICATION OF FEDERAL LAW IN THE WESTERN SECTORS." (COMMENT: ALTHOUGH OUR RECORDS DO NOT CONTAIN MORE PRECISE DESCRIPTION OF TAGESSPIEGEL STORY, WE HAVE A 1972 INTRA-BERLIN MESSAGE IN WHICH FRENCH SAY THAT THAT STORY DEALT WITH EARLY STAGES OF MAHLER INVESTIGATION. END COMMENT.)

1. ALLIED REPS NOTED THAT SOVIET PROPOSALS WERE NEW AND CREATED DIFFICULTIES. THEY DID NOT ADDRESS STATEMENT ABOUT FEDERAL PROSECUTOR DIRECTLY BUT EXPLAINED THAT THEY "HAD NO INTENTION OF REMOVING FEDERAL COURTS FROM BERLIN."

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12. WHEN ADVISERS RETURNED FOLLOWING DAY TO SUBJECT (USBERLIN 979 OF 1971), ALLIED REPS ASKED KVITSINSKIY TO MAKE MORE PRECISE WHOM HE HAD IN MIND WHEN HE SPOKE OF LIMITING ACTIVITIES OF "OFFICIAL REPRESENTATIVES OF FRG." HE RESPONDED THAT HIS DESIRED LIST OF SUCH REPRESENTATIVES BEGAN WITH FEDERAL PRESIDENT AND INCLUDED AT MINIMUM THOSE MENTIONED IN BASIC LAW BUT THAT IT ALSO INCLUDED "THE FEDERAL MINISTERS, AND IN PARTICULAR THE FEDERAL ATTORNEYS AND THE TOP-RANKING JUDGES FROM THE FEDERAL COURTS." ASKED BY ALLIED REPS HOW HE INTERPRETED PHRASE "COMPORT THEMSELVES," KVITSINSKIY "CITED AS AN EXAMPLE AN EARLIER STATEMENT BY THE FEDERAL ATTORNEY GENERAL THAT BERLIN WAS A LAND OF THE FRG, THAT THE FREE WILL OF THE GERMAN PEOPLE

WAS BEING HINDERED AND THAT IN TIME FRG WOULD HAVE TO CLARIFY THIS RELATIONSHIP WITH THREE POWERS AND SOVIET UNION. THIS HAD ALL APPEARED IN NEWSPAPERS."

13. AFTER EXPLAINING DIFFERENCE BETWEEN OFFICIAL ACTS AND EXPRESSIONS OF OPINION, "ALLIED REPS REFERRED TO CONFIDENTIAL

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KVITSINSKIY'S REMARKS IN PREVIOUS SESSION CONCERNING A REPORT IN TAGESSPIEGEL THAT A DECISION HAD BEEN TAKEN BY THE FEDERAL COURT IN KARLSRUHE THAT THE FEDERAL ATTORNEY GENERAL COULD FUNCTION IN THE WESTERN SECTORS. THEY WISHED TO POINT OUT THAT THIS OFFICIAL FUNCTIONED IN WESTERN SECTORS ONLY IN ACCORDANCE WITH WEST BERLIN LEGISLATION, AND NOT IN ACCORDANCE WITH FEDERAL LEGISLATION." ADVISORS THEN ENTERED ONTO DISCUSSION IN WHICH KVITSINSKIY INDICATED THAT SOVIET OBJECTIVE WAS TO OBTAIN ALLIED CONFIRMATION THAT LAWS IN FORCE IN BERLIN ARE BERLIN, NOT FEDERAL LEGISLATION, AND ALLIED REPS EXPLAINED MANTELGESETZ PROCEDURE AND ALLIED THEORY OF OPERATION OF FEDERAL COURTS IN BERLIN. TOWARD END OF DISCUSSION, ADVISORS RETURNED TO LIST OF "OFFICIAL REPRESENTATIVES" WHICH KVITSINSKIY SOUGHT TO INCLUDE IN AGREEMENT, AND SOVIET REP INDICATED MUCH OF HIS CONCERN WOULD BE MET IF ALLIES AGREED TO INCLUDE REFERENCE TO FEDERAL MINISTERS.

14. DEPARTMENT'S SUBSEQUENT INSTRUCTIONS (STATE 101183 OF 1971) WERE "TO BE WARY OF ADDITIONAL SOVIET SENTENCES FOR.. ANNEX II WHICH COULD PROVIDE BASIS FOR ENDLESS SOVIET ARGUMENTS AS TO WHETHER SPECIFIC OFFICIALS OR BODIES ARE PERMITTED TO ACT IN WESTERN SECTORS", AND ADVISORS' DISCUSSIONS TRAILED AWAY FROM SUBJECT OF FEDERAL COURTS AND FEDERAL PROSECUTOR. AT ANY EVENT, AS NOTED BY FRG IN 1972 BONN GROUP DISCUSSION OF MAHLER CASE, FEDERAL PROSECUTOR WAS NOT INCLUDED IN LIST OF OFFICIALS AND STATE BODIES RESTRICTED WITH RESPECT TO EXERCISE OF DIRECT STATE AUTHORITY OVER WESTERN SECTORS AS ORIGINALLY DESIRED BY SOVIETS. FEDERAL COURTS WERE INCLUDED IN LETTER OF THREE AMBASSADORS TO FRG CHANCELLOR BUT SUBSEQUENT ALLIED LETTER TO FRG FOREIGN MINISTER OF MAY 17, 1972 CLARIFYING ANNEX II STATED THAT"... NO ALTERATION IN THE ACTIVITIES OF THE FEDERAL CURTS IN BERLIN IS FORESEEN UNDER THE PROVISIONS OF THE QUADRIPARTITE AGREEMENT....," WHILE NOT REFERRING TO ACTIVITIES OF FEDERAL PROSECUTOR.

15. COMMENT: LEGAL GROUNDS FOR FEDERAL PROSECUTION
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APPEAR TO US SOLID. PROSECUTION WOULD BE HANDLED PURSUANT TO LAWS ADOPTED IN BERLIN, AND PROSECUTOR WOULD BE SUBJECT TO ULTIMATE ALLIED CONTROL IN SAME MANNER AS WOULD ANY BERLIN OFFICIAL. QA RECORD IS STRENGTHENED BY FACT THAT ALLIES REVIEWED FOR SOVIETS OUR RELEVANT THEORY ON OPERATION OF FEDERAL PROSECUTOR IN BERLIN UNDER LAWS IN FORCE HERE DURING NEGOTIATIONS. ON ANOTHER LEVEL, IT WOULD APPEAR THAT WE ARE COMMITTED TO DETERMINATION REACHED IN BONN GROUP WITH FRG IN 1972 AND SUBSEQUENTLY CONFIRMED PUBLICLY IN RESPONSE TO PRESS INQUIRIES THAT FEDERAL PROSECUTION OF TERRORIST BEFORE BERLIN COURT IS CONSISTENT WITH POST-QA STATUS. ANY DECISION TO TREAT PRESENT CASE OTHER THAN AS WE TREATED MAHLER CASE, THEREFORE, WOULD HAVE TO BE TAKEN AND JUSTIFIED IN LIGHT OF POLITICAL CONSIDERATIONS.

16. WE BELIEVE IT IS STILL TOO EARLY TO MAKE FIRM RECOMMENDATIONS ON POLITICAL ASPECTS. WE SHOULD FIRST OBTAIN FRG AND FURTHER SENAT VIEWS. WE WOULD WISH TO KNOW, INTER ALIA, HOW SENAT ASSESSES POLITICAL IMPLICATIONS AS WELL AS LEGAL PRECEDENTS (IN ADDITION TO MAHLER CASE) FOR FEDERAL OR, ALTERNATIVELY, BERLIN PROSECUTION AND TO LEARN JUST HOW MANY TRIALS ARE ACTUALLY ENVISAGED. IT IS NOT CLEAR, FOR EXAMPLE, WHETHER THERE WOULD BE ONE TRIAL FOR ALL OFFENSES OUTLINED IN PROSECUTOR'S REPORT OR WHETHER THERE WOULD BE SERIES OF TRIALS. GROUNDS FOR FEDERAL PROSECUTION CONCEIVABLY MIGHT BE STRONGER WITH RESPECT TO LORENZ KIDNAPPING WHICH CLEARLY HAD SPILL-OVER INTO FRG THAN, FOR EXAMPLE, LOCAL ROBBERIES COMMITTED BY JUNE 2 MEMBERS OR KILLING OF VON DRENCKMANN IN BERLIN.

17. PENDING RECEIPT OF MORE DETAILED INFORMATION FROM GERMAN SOURCES, HOWEVER, OUR PRELIMINARY ESTIMATE IS THAT, ON BALANCE, IT WOULD PROBABLY BE BEST TO SEEK WAY TO PERMIT FEDERAL PROSECUTION, AT LEAST OF LORENZ KIDNAPPING AND SUCH OTHER CRIMES AS ARE INEXTRICABLY LINKED TO THAT AFFAIR, BUT IN MANNER WHICH WOULD RAISE FEWEST SOVIET HACKLES. IT IS THEORETICALLY POSSIBLE FOR LOCAL BERLIN AUTHORITIES TO HANDLE PROSECUTION, BUT UNDER APPLICABLE GERMAN LAW THIS WOULD

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REQUIRE DECISION, EITHER BY FEDERAL PROSECUTOR OR BY ALLIES, THAT CASE WAS NOT ONE OF GENERAL SIGNIFICANCE.

GIVEN FACTS OF CASE AND CLEAR TIE-IN WITH CON-CURRENT EVENTS IN FRG, SUCH A DETERMINATION WOULD BE TRANSPARENTLY POLITICAL AND WOULD BRING ALLIES UNDER HEAVY CRITICISM BOTH IN BERLIN AND FRG FOR YIELDING TO SOVIET PRESSURE AND REVERSING MAHLER PRECEDENT. WERE WE TO TAKE SUCH A STEP, WE MIGHT ALSO ENCOURAGE SOVIETS TO BELIEVE THAT THEY COULD FORCE RETREAT ON ALLIED POSITION WITH RESPECT TO FEDERAL COURTS AS WELL AS FEDERAL PROSECUTOR. WE ALSO DOUBT THAT IT IS FEASIBLE TO CONSIDER SWITCHING VENUE TO FRG. CONCERN FOR THREAT TO PUBLIC ORDER IS FAR LESS THAN IT WAS AT TIME OF MAHLER TRIAL, AND SO MANY OF THE CRIMES, ARRESTS, ETC., TOOK PLACE IN BERLIN THAT TRANSFER WOULD ALSO APPEAR TRANSPARENT POLITICAL ACT.

18. ON OTHER HAND, WE DO NOT BELIEVE THAT SOVIETS, EVEN IF THEY WERE QUIET DURING MAHLER TRIAL, WOULD LET PRESENT OCCASION PASS WITHOUT SOME SORT OF PROTEST. THEY NOW REGULARLY PROTEST ANY MATTER THAT DOES NOT SQUARE WITH THEIR VIEW OF QA, AND THEY HAVE ALREADY PROBED POSITION ON FEDERAL COURT COMPETENCE IN CONNECTION WITH 1974 BRUECKMANN AFFAIR. WE SHOULD PROBABLY BE LOOKING FOR WAY IN WHICH TO PRESENT PROSECUTION IN RELATIVELY PALATABLE MANNER SO THAT ANY EXCHANGE WOULD BE TERMINATED QUICKLY AND NOT RISE ABOVE POLAD-SOVIET EMBASSY LEVEL. ONE THOUGHT THAT OCCURS TO US IS THAT ANNOUNCEMENT THAT CHARGES HAVE BEEN FILED BY FEDERAL PROSECUTOR SHOULD ORIGINATE IN BERLIN, NOT KARLSRUHE, AND SHOULD EMPHASIZE THAT IT IS BERLIN BRANCH OFFICE THAT IS HANDLING CASE, NOT DR. BUBACK PERSONALLY. ORIGINAL ANNOUNCEMENT MIGHT ALSO BE STAGE-MANAGED TO INCLUDE STATEMENT THAT BASIS FOR ACTION INCLUDES BK/O(51)63 AND THUS ULTIMATE ALLIED CONTROL THAT WE INSISTED ON WHEN WE PERMITTED ADOPTION OF RELEVANT LAW IN BERLIN IN 1969. FRG AGREEMENT MIGHT ALSO BE SOUGHT IN ADVANCE THAT DURING COURSE OF TRIAL DR. BUBACK AND HIS PEOPLE WILL SEEK TO AVOID STATEMENTS OR OTHER ACTIONS THAT MIGHT IMPLY THEY WERE NOT CONGNIZANT OF BERLIN'S SPECIAL STATUS. GEORGE
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TAGS: PGOV, PFOR, WB, GE, UR, (LORENZ, PETER)
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